

Gregg M. Galardi, Esq.
Ian S. Fredericks, Esq.
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM, LLP
One Rodney Square
PO Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

Dion W. Hayes (VSB No. 34304)
Douglas M. Foley (VSB No. 34364)
MCGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, Virginia 23219
(804) 775-1000

- and -

Chris L. Dickerson, Esq.
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM, LLP
155 North Wacker Drive
Chicago, Illinois 60606
(312) 407-0700

Counsel to the Debtors and
Debtors in Possession

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

- - - - - - - - - - - - - - - x
:
In re: : Chapter 11
:
CIRCUIT CITY STORES, INC., : Case No. 08-35653 (KRH)
et al., :
:
Debtors. : Jointly Administered
- - - - - - - - - - - - - - - x

**MOTION FOR ORDERS UNDER BANKRUPTCY CODE SECTIONS 105, 363
AND 503 AND BANKRUPTCY RULES 2002 AND 6004**

**(I)(A) APPROVING BIDDING PROCEDURES FOR SALE OF CERTAIN
REAL PROPERTY IN MORENO VALLEY, CALIFORNIA,
(B) AUTHORIZING SELLERS TO ENTER INTO AGREEMENT IN
CONNECTION THEREWITH SUBJECT TO HIGHER AND BETTER
PROPOSALS (C) APPROVING EXPENSE REIMBURSEMENT IN
CONNECTION THEREWITH (D) SETTING AUCTION AND SALE HEARING
DATES; (II) APPROVING SALE OF PROPERTY FREE AND CLEAR OF
LIENS; AND (III) AND GRANTING RELATED RELIEF**

Circuit City Stores West Coast, Inc. (the
"Seller," and collectively with the debtors and debtors

in possession in the above-captioned jointly administered cases, the "Debtors")¹ hereby moves (the "Motion") for orders pursuant to sections 105, 363 and 503 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") (I)(a) approving the bidding procedures set forth herein and attached hereto as Exhibit A (the "Bidding Procedures") for the sale (the "Sale") of the Seller's real property located at 12530 Day Street in Moreno Valley, California, including all vested signage rights of the Seller in connection with such real property and the building located thereon (including, without limitation rights to signage granted to the Seller pursuant to that certain Development Agreement dated as of October 24, 2003 by and among Gateway Company,

¹ The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc.(6796), Sky Venture Corp. (0311), PRAHS, Inc.(n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courchevel, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512). The address for Circuit City Stores West Coast, Inc. is 9250 Sheridan Boulevard, Westminster, Colorado 80031. For all other Debtors, the address was 9950 Mayland Drive, Richmond, Virginia 23233 and currently is 4951 Lake Brook Drive, Glen Allen, VA 23060.

L.C. and Seller) (the "Property") (b) authorizing the Sellers to enter into Purchase and Sale Agreement (as amended, the "Agreement"), dated as of May 15, 2009 by and among the Seller and 99¢ Only Stores (the "Purchaser"), a copy of which is attached hereto as Exhibit B, subject to higher and better proposals, (c) approving the Expense Reimbursement (as defined herein) in connection therewith, and (d) scheduling auction and sale hearing dates; (II) approving the Sale of the Property free and clear of all interests; and (III) granting related relief In support of this Motion, the Seller respectfully represents as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction to consider the Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and the Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

2. The predicates for the relief requested here are Bankruptcy Code sections 105(a), 363 and 503 and Bankruptcy Rules 2002 and 6004.

BACKGROUND

3. On November 10, 2008 (the "Petition Date"), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code.

4. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to Bankruptcy Code sections 1107 and 1108.

5. On November 12, 2008, the Office of the United States Trustee appointed a statutory committee of unsecured creditors (the "Creditors' Committee"). To date, no trustee or examiner has been appointed in these chapter 11 cases.

6. On January 16, 2009, the Court authorized the Debtors, among other things, to conduct going out of business sales at the Debtors' remaining 567 stores pursuant to an agency agreement (the "Agency Agreement") between the Debtors and a joint venture, as agent (the "Agent"). On January 17, 2009, the Agent commenced going out of business sales pursuant to the Agency Agreement at the Debtors' remaining stores.

RELIEF REQUESTED

7. By this Motion, the Seller seeks approval for the Sale of the Property to the Purchaser, subject to additional competitive bidding pursuant to the proposed Bidding Procedures. The Seller seeks entry of two types of relief. First, at the omnibus hearing to be held on July 23, 2009, substantially in the form attached hereto as Exhibit C (the "Bidding Procedures Order") approving the Bidding Procedures, entry into the Agreement and the Expense Reimbursement. Second, subject to the terms of the Bidding Procedures Order, at the omnibus hearing to be held on August 27, 2009, the Seller will seek entry of an order substantially in the form attached hereto as Exhibit D (the "Sale Approval Order") authorizing and approving the Sale of the Property to the Purchaser or to the Successful Bidder, as the case may be.

8. As more fully set forth below, after a comprehensive strategic review, the Seller believes that the Sale represents its best opportunity under the circumstances to maximize the value of the Property. Therefore, the Sale is in the best interests of its estate and its stakeholders.

BASIS FOR RELIEF

A. Events Leading To The Sale.

9. In light of the facts forth above -- in particular, the failure to obtain any feasible going concern bids and the decision to liquidate the Debtors' inventory through going-out-of-business sales -- the Seller has been left with various assets -- including the Property -- for which it has no remaining use. In contrast, the sale of such assets, including the Sale of the Property, would result in significant proceeds for the Seller's estate and creditors.

10. Since around the time of commencement of the going out of business sales, the Seller, along with its real estate advisor, DJM Realty, LLC ("DJM"), has been marketing the Property. As a result of these marketing efforts, the Seller received various proposals to purchase the Property. Upon reviewing these proposals, the Seller determined that the proposal submitted by the Purchaser was materially higher or otherwise better than the alternate proposals received. Thus, the Seller elected to proceed with the Sale of the Property to the Purchaser.

B. The Agreement.

11. On May 15, 2009, the Seller entered into the Agreement² by and between the Seller and the Purchaser.

12. Pursuant to the Agreement, the Seller would sell the Property to the Purchaser for \$2.25 million (the "Purchase Price").

13. The significant terms of the Agreement are as follows:³

(a) General Terms. The Purchaser would acquire the Property, consisting solely of the Seller's right, title and interest in and to the property located at 12530 Day Street, Moreno Valley, California, consisting of approximately 3.53 acres, and including (i) all rights and appurtenances pertaining to such land, (ii) all buildings, structures and other improvements on said land and (iii) electrical, mechanical, air conditioning and other fixtures attached thereto, (iv) all vested signage rights of the Seller in connection with such real property and the building located thereon (including, without limitation rights to signage granted to the Seller pursuant to that certain Development Agreement dated as of October 24, 2003 by and among Gateway Company, L.C. and Seller), and (v) to the extent assignable, plans, specifications, permits, reports, development rights and title insurance as more fully described in Exhibit A to the Agreement through an asset sale.

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Agreement.

³ In the event of any discrepancy between the Agreement and this summary of the Agreement, the provisions of the Agreement are controlling.

(b) Sale. The Property would be sold free and clear of all liens, charges, pledges, security interests, conditional sale agreements or other title retention agreements, leases, mortgages, security interests, options, or other encumbrances (including the filing of, or agreement to give, any financing statement under the Uniform Commercial Code of any jurisdiction) and any monetary amounts which are secured by any lien (collectively, the "Liens"), except for (i) liens for real property taxes that are not yet due and payable, (ii) zoning ordinances, building codes and other land use laws and applicable governmental regulations, (iii) all covenants, agreements, conditions, easements, restrictions and rights, whether of record or otherwise (excluding, however, mortgages, deeds of trust, mechanics liens, tax liens, judgment liens, any other liens securing monetary amounts, leases, licenses, any other similar agreements conveying possessory rights, purchase option rights, rights of first refusal and any other similar rights of purchase and (iv) any and all matters that would be shown by a physical inspection of the Property (collectively, the "Permitted Encumbrances").

(c) Bankruptcy Court Approval. The Sale of the Property would be subject to approval by this Court and competitive bidding pursuant to the Bidding Procedures.

(d) Documentation. The Sale would be effected pursuant to the Agreement and related documentation.

(e) Purchase Price. The Purchase Price to be paid by the Purchaser for the Property would be \$2.25 million.

(f) Deposit Escrow. In accordance with the Agreement, the Purchaser has previously placed \$225,000 into an escrow account. Upon closing of the Sale (the "Closing"), or if the Agreement is terminated prior to Closing because of the Purchaser's breach of the Agreement (on the terms as provided in the Agreement), the Seller would be entitled to the funds in the escrow ac-

count (the "Deposit"). Retention of the Deposit would constitute the Seller's sole recourse in such event.

(g) Representations And Warranties. Pursuant to the Agreement, the Seller would provide certain standard representations and warranties relating to the Sale of the Property and the Purchaser would provide representations and warranties generally standard in a transaction of this type. The representations and warranties of the Purchaser survive the Closing or the termination of the Agreement. The representations and warranties of the Seller shall expire and be extinguished at the closing.

(h) Termination. The Agreement could be terminated prior to Closing in the following circumstances: (i) by Purchaser, if an action is initiated to take any material portion of the Property by eminent domain proceedings, (ii) by Purchaser, in the event of damage to the Property exceeding \$200,000 occurring during the period after the date of the Agreement and prior to Closing, if Seller does not repair such damage, (iii) by Purchaser, in the event that Seller shall fail to consummate the transactions contemplated by the Agreement, (iv) by Seller, in the event that Purchaser shall fail to comply with the Agreement and (v) by Seller, in order to permit Seller to accept a higher or better offer for the Property pursuant to the Bidding Procedures.

D. Expense Reimbursement.

14. In the event the Purchaser is not permitted to purchase the Property pursuant to the sale process outlined in this Motion, in addition to the Deposit being disbursed to the Purchaser, the Seller has agreed to reimburse the Purchaser for its reasonable out-of-pocket third-party due diligence expenses and reasonable attorneys' fees and costs incurred in connection with the

Agreement (the "Expense Reimbursement"). Under the Agreement, the Expense Reimbursement would not exceed thirty-five thousand dollars (\$35,000) in the aggregate amount. The Purchaser has expended, and likely will continue to expend, considerable time, money, and energy pursuing the Sale and has engaged in arm's length and good faith negotiations regarding a possible sale of the Property. The Agreement is the culmination of these efforts.

15. In recognition of this expenditure of time, energy, and resources, the Seller has agreed to the Expense Reimbursement. Specifically, the Agreement provides for, and the Seller respectfully requests that the Sale Order approve, the Expense Reimbursement payable by the Seller to the Purchaser in an amount not to exceed \$35,000 if the Purchaser is unable to purchase the Property pursuant to the sale process outlined in this Motion.

16. The Seller believes that the proposed Expense Reimbursement is fair and reasonable in view of (a) the analysis, due diligence investigation, and negotiation undertaken by the Purchaser in connection with

the Sale and (b) the fact that the Purchaser's efforts would maximize the value of the Property for the benefit of all stakeholders, whether as a result of consummating the Sale pursuant to the Agreement or by generating a higher or otherwise better offer.

17. The Purchaser is unwilling to keep open its offer to purchase the Property under the terms of the Agreement unless this Court authorizes payment of the Expense Reimbursement. Thus, absent entry of the Bidding Procedures Order with approval of the Expense Reimbursement, the Seller may lose the opportunity to obtain what it believes to be the highest or otherwise best offer for the Property. And, as described below, the Agreement is subject to higher or otherwise better proposals. Approving the Expense Reimbursement will thus commit the Purchaser to purchase the Property under the Agreement, and the Agreement would serve as a floor for any additional bidding for the Property at a fair and reasonable purchase price.

18. Payment of the Expense Reimbursement will not diminish the Seller's estate. The Seller would not expect to pay the Expense Reimbursement unless it does so

to accept an alternate proposal, which would result in even greater value to the Seller's estate and its stakeholders. This is particularly true given the Initial Minimum Overbid requirement (as defined below), which ensures that other proposals represent higher or otherwise better offers for the Property taking into account payment of the Expense Reimbursement. The Seller thus requests that this Court authorize payment of the Expense Reimbursement pursuant to the terms and conditions of the Agreement.

D. The Bidding Procedures.

19. The Sale of the Property would be subject to higher or otherwise better offers pursuant to the Bidding Procedures. The Seller believes that the proposed structure of the Bidding Procedures is the one most likely to maximize the realizable value of the Property for the benefit of the Seller's estate, its stakeholders, and other interested parties. Accordingly, the Seller seeks approval of the Bidding Procedures for the Sale of the Property.

20. The Bidding Procedures describe, among other things, the asset available for sale, the manner in

which bidders and bids become "qualified," the conduct of any subsequent Auction, the ultimate selection of the Successful Bidder, and this Court's approval thereof (the "Bidding Process").

21. The material terms of the proposed Bidding Procedures are as follows:⁴

(a) Assets To Be Sold: The asset proposed to be sold is the Property.

Qualified Bids: To ensure that only bidders with a serious interest in the purchase of the Property participate in the Bidding Process, the Seller would only consider the "Qualified Bids" of "Qualified Bidders". To be considered a "Qualified Bid" for purposes of the Auction the person or entity submitting the bid would be required to submit an offer by the Bid Deadline (as defined herein) that includes: (i) an executed copy of the Agreement marked to show those amendments and modifications to the Agreement that the Qualified Bidder proposes, including modifications to the Purchase Price, which price must be at least \$2,350,000(such modified Agreement, a "Marked Agreement"), (ii) a statement that the bid does not provide for any due diligence period or property inspection period, (iii) the potential bidder and the officer(s) or authorized agent(s) who will appear on behalf of such bidder, (iv) evidence, satisfactory to the Seller in its reasonable discretion (after consultation with representatives the Creditors' Committee), of the bidder's financial wherewithal, (v) a statement that the bid shall not be conditioned on the outcome of unperformed due diligence by the bidder or any financing contingency, (vi) a

⁴ In the event of any conflict between the Bidding Procedures and this summary of the Bidding Procedures, the provisions of the Bidding Procedures control. Capitalized terms used but not otherwise defined in this summary have the meanings ascribed to them in the Bidding Procedures.

good faith deposit (the "Good Faith Deposit") equal to the greater of (x) 10% of the cash component of the purchase price or (y) \$235,000, (vii) an acknowledgement that the bidder's offer is irrevocable until two (2) business days after the Closing of the Sale of the Property; and (viii) an acknowledgement that, in the event the bidder is the Alternate Bidder, the bidder will proceed with the purchase of the Property pursuant to the terms the Marked Agreement, as may be modified at the Auction.

(b) Due Diligence: The Seller shall have the right to hold a one-day "open house" event for any interested parties to physically examine the Property and improvements. Each Qualified Bidder would be deemed to acknowledge and represent that it has had an opportunity to conduct any and all due diligence regarding the Property prior to making its offer, that it has relied solely upon its own independent review, investigation, and/or inspection of any documents and/or the Property in making its bid. However, as stated above, to be considered a Qualified Bid, a bid must contain a statement that the bid does not provide for any due diligence period or property inspection period.

(c) Bid Deadline: Any person or entity wishing to participate in the Auction would be required to submit a Qualified Bid on or before August 13, 2009 at 5:00 p.m. (Eastern) (the "Bid Deadline"). The Seller could extend the Bid Deadline (after consultation with representatives of the Creditors' Committee) to a date and time that is not later than 12:00 midnight on August 19, 2009, and could seek Court authority to extend the Bid Deadline beyond such date.

(d) Conduct Of Auction: If the Seller receives at least one Qualified Bid in addition to that of the Purchaser, it would conduct an auction of the Property (the "Auction") at the offices of Skadden, Arps, Slate, Meagher & Flom LLP, One Rodney Square, P.O. Box 636, Wilmington, DE 19801, tentatively commencing at 10:00 a.m. (Eastern) on August 20, 2009. The Seller could extend the commencement of the Auction (after consultation with representatives of the Creditors' Commit-

tee) to a date that is not later than August 24, 2009, and could seek Court authority to extend the Bid Deadline beyond such date. The Auction would be conducted in accordance with the following procedures, among others:

(i) participation in the Auction would be limited to the Purchaser and the Qualified Bidder(s), (ii) prior to the commencement of the Auction, the Seller would advise the Purchaser and all Qualified Bidders of what it believes to be the highest or otherwise best Qualified Bid received and (iii) bidding would begin initially with the highest or otherwise best Qualified Bid and subsequently continue in such minimum increments as the Seller, after consultation with representatives of the Creditors' Committee, would determine at the Auction, provided, however, such minimum increments would not exceed \$50,000.

(e) Selection Of Successful Bid: As soon as practicable after the conclusion of the Auction, the Seller would review each Qualified Bid and identify the highest or otherwise best offer(s) for the Property (the "Successful Bid," and the bidder making such bid, the "Successful Bidder"). The Seller would sell the Property to the Successful Bidder for the highest or otherwise best Qualified Bid upon the approval of such Qualified Bid by the Bankruptcy Court after the Sale Hearing.

(f) Sale Hearing: The Sale Hearing would be held on August 27, 2009, at 11:00 a.m. (Eastern), but could be adjourned or rescheduled in the Seller's sole discretion, subject to Bankruptcy Court approval, as necessary, without further notice other than an announcement of the adjourned date at the Sale Hearing. If no Qualified Bids other than that of the Purchaser are received, the Seller would proceed with the Sale to the Purchaser following entry of the Sale Approval Order. If the Seller receives additional Qualified Bids, then at the Sale Hearing, the Seller would seek approval of the Successful Bid, as well as the second highest or best Qualified Bid (the "Alternate Bid," and such bidder, the "Alternate Bidder"). A bid would not be deemed accepted by the Seller unless and until approved by the Court. Following approval of the Sale to the Successful Bidder, if the Successful Bidder fails to consummate the sale for

specified reasons, then the Alternate Bid would be deemed to be the Successful Bid and the Seller would be permitted to effectuate a Sale to the Alternate Bidder without further order of the Court.

(g) Return Of Good Faith Deposits: The Good Faith Deposits of all Qualified Bidders (except for the Successful Bidder) would be held and all Qualified Bids would remain open until two business days following the Closing of the Sale (the "Return Date"). Notwithstanding the foregoing, the Good Faith Deposit submitted by the Successful Bidder, together with interest thereon, if any, would be applied against the payment of the Purchase Price upon Closing of the Sale to the Successful Bidder. If a Successful Bidder failed to consummate an approved sale, the Seller would not have any obligation to return such Good Faith Deposit and such deposit would irrevocably become property of the Seller. Subject to the preceding sentence, on the Return Date, the Seller would return the Good Faith Deposits of all other Qualified Bidders, together with the accrued interest thereon, if any.

(h) Reservation Of Rights: The Seller would reserve the right to (i) determine in its reasonable discretion (after consultation with representatives of the Creditors' Committee) which offer is the highest or otherwise best offer, (ii) reject at any time prior to the Closing of a Sale, without liability, any offer that the Seller in its reasonable discretion (after consultation with representatives of the Creditors' Committee) deems to be (x) inadequate or insufficient, (y) not in conformity with the requirements of the Bidding Procedures or applicable law or (z) contrary to the best interests of the Seller and its estate and (iii) waive the requirements of any of the Bidding Procedures with respect to a potential or Qualified Bidder if the Seller determines in its business judgment (after consultation with representatives of the Creditors' Committee) it is in the best interests of its estate and creditors

22. Objections to the Bidding Procedures, if any, should be filed and served no later than 4:00 p.m. (Eastern) on July 16, 2009. The Debtors request that the Court order that objections to the Sale, if any, be filed and served no later than 4:00 p.m. (Eastern) on August 21, 2009.

APPLICABLE AUTHORITY

I. THE BIDDING PROCEDURES ARE REASONABLE AND APPROPRIATE.

23. Bankruptcy Code section 363(b)(1) provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Moreover, Bankruptcy Code section 105(a) provides that "[t]he Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

24. The Seller believes that the Bidding Procedures are appropriate under Bankruptcy Code sections 105 and 363 to ensure that the bidding and auction process is fair and reasonable and will yield the maximum value for its estate and creditors. The Bidding Proce-

dures permit the Seller to maximize the value of the Property. In addition, the Bidding Procedures set deadlines for conducting the Auction and holding the Sale Hearing with respect to the transaction proposed herein.

25. The Seller presently faces the possibility of continued deterioration of its assets, including the Property. Thus, the Seller believes that it must be permitted to conduct the Sale process in the manner and on the timetable set forth herein and in the Bidding Procedures.

26. Accordingly, the Seller believes the Court should approve the Bidding Procedures, including the dates established therein for, inter alia, the submission of bids, the Auction and the Sale Hearing. Similar procedures have been previously approved by this Court in this and other cases. See, e.g., In re Circuit City Stores, Inc., Case No. 08-35653 (KRH)(Bankr. E.D. Va. Mar. 3, 2009) (D.I. 2401); In re The Rowe Companies, Case No. 06-11142 (SSM) (Bankr. E.D. Va. Dec. 20, 2006); In re Ceyoniq, Inc., Case No. 02-85887 (RGM) (Bankr. E.D. Va. Jan. 30, 2003).

**II. APPROVAL OF THE SALE OF THE PROPERTY IS WARRANTED
UNDER BANKRUPTCY CODE SECTION 363(b)(1).**

27. As set forth above, Bankruptcy Code section 363(b)(1) authorizes a trustee to "use, sell, or lease" property of the estate with the Court's approval. 11 U.S.C. § 363(b)(1). Assets of the Debtors may be sold outside of the ordinary course of business, pursuant to Bankruptcy Code section 363(b)(1), if a sound business purpose exists for doing so. In re WBQ P'ship, 189 B.R. 97, 102 (Bankr. E.D. Va. 1995) (citing Stephens Indus., Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986)); see also In re W.A. Mallory Co., Inc., 214 B.R. 834, 836 (Bankr. E.D. Va. 1997)).

28. To satisfy the "sound business purpose test," the debtor must demonstrate that (1) a sound business reason or emergency justifies a pre-confirmation sale; (2) the sale was proposed in good faith; (3) the purchase price is fair and reasonable; and (4) adequate and reasonable notice of the sale has been provided. In re WBQ P'ship, 189 B.R. at 102.

29. Based upon the results of their analysis, the Seller's management and advisors have concluded that

the Sale of the Property in accordance with the Bidding Procedures will maximize recoveries to the estate and prevent further deterioration of the value of the Property. Furthermore, by selling the Property, the Seller will be able to minimize administrative expenses associated with maintaining the Property. Maximizing asset value, preventing further deterioration, and reducing costs to the estate are sound business purposes that warrant authorizing the proposed Sale.

30. The Sale of the Property will be subject to competing bids, thereby enhancing the Seller's ability to receive the highest or otherwise best value for the Property. Consequently, the fairness and reasonableness of the consideration to be received by the Debtors will ultimately be demonstrated by a "market check" through the auction process, which is the best means for establishing whether a fair and reasonable price is being paid.

31. Moreover, all creditors and parties in interest will receive adequate notice of the Auction and the Hearing as set forth below. In light of the circumstances, such notice is reasonably calculated to provide

timely and adequate notice to the Debtors' major creditor constituencies, those parties most interested in these cases, those parties potentially interested in bidding on the Property and others whose interests are potentially implicated by the proposed Sale.

**III. THE EXPENSE REIMBURSEMENT REQUESTED HEREIN IS
REASONABLE AND SHOULD BE APPROVED.**

32. In connection with Sale of the Property, the Court should authorize the Seller to pay the Expense Reimbursement.

33. Agreements to provide expense reimbursements and other bidding incentives are designed to compensate a potential acquirer who serves as a catalyst that may attract higher and better offers, and have been approved in bankruptcy to encourage bidding. See In re Ryan, 261 B.R. 867, 870 (Bankr. E.D. Va. 2001). Expense reimbursements can be advantageous to both buyers and sellers because they encourage bidding to ensure that sellers receive the highest or otherwise best offer while compensating the buyer for the risk of being outbid. See id.

34. Expense reimbursements are allowed as an administrative expense claim against the estate if they satisfy the standard of section 503(b)(1). In re Tropea, 352 B.R. 766, 768 (Bankr. N.D.W.Va. 2006). Thus, the fee must reflect the actual and necessary cost of preserving the estate. See 11 U.S.C. § 503(b)(1). See also In re Tropea, 352 B.R. at 768. In Calpine Corp. v. O'Brien Env'tl. Energy, Inc. (In re O'Brien Env'tl. Energy, Inc.), 181 F.3d 527 (3d Cir. 1999), the United States Court of Appeals for the Third Circuit explained how the section 503(b)(1) standard applied to expense reimbursements. The Third Circuit Court of Appeals held that even though bidding incentives are measured against a business judgment standard in non-bankruptcy transactions, the administrative expense provisions of Bankruptcy Code section 503(b) govern in the bankruptcy context. Accordingly, to be approved, bidding incentives must provide some post-petition benefit to the debtor's estate. See id. at 533; see also In re Lamb, 2002 WL 31508913 (Bankr. D. Md. 2002) (implicitly adopting the administrative expense standard set forth in O'Brien).

35. The O'Brien Court identified at least two instances in which bidding incentives may provide benefit to the estate. First, benefit may be found if "assurance of a break-up fee promoted more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited." Id. at 537. Second, when the availability of bidding incentives induce a bidder to research the value of the debtor and submit a bid that serves as a minimum or floor bid on which other bidders can rely, "the bidder may have provided a benefit to the estate by increasing the likelihood that the price at which the [asset] is sold will reflect its true worth." Id.

36. Here, the Seller seeks authority to pay the Expense Reimbursement in the event that the Purchaser is not ultimately the Successful Bidder. The proposed Expense Reimbursement is appropriate under Bankruptcy Code section 503 as it is fair and reasonable in amount, particularly in view of the efforts that have been and will have to be expended by the Purchaser. Moreover, the Agreement, including the Expense Reimbursement provided for therein, will enable the Seller to secure an adequate

floor for an auction and, thus, ensure that competing bids be materially higher or otherwise better than the Purchase Price pursuant to the Agreement (as incorporated in the Initial Minimum Overbid requirement), a clear benefit to the Seller's estate.

37. In sum, the Seller's ability to offer the Expense Reimbursement enables it to ensure the Sale of the Property to a contractually-committed bidder at a price that it believes to be fair while, at the same time, providing the Seller with the potential of even greater benefit to the estates.

38. Accordingly, the Expense Reimbursement should be approved.

IV. THE PURCHASER OR ANY OTHER SUCCESSFUL BIDDER IS A GOOD FAITH PURCHASER PURSUANT TO SECTION 363(m) OF THE BANKRUPTCY CODE AND THE TRANS ACTION CONTEMPLATED BY THE AGREEMENT SHOULD CARRY THE PROTECTIONS OF SECTION 363(n) OF THE BANKRUPTCY CODE.

39. Section 363(m) of the Bankruptcy Code provides:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such

property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). While the Bankruptcy Code does not define "good faith," the Fourth Circuit Court of Appeals has "adopt[ed] the traditional equitable definition that has been adopted by various courts of appeal: 'one who purchases the assets for value, in good faith, and without notice of adverse claims.'" Willemain v. Kivitz, 764 F.2d 1019, 1023 (4th Cir. 1985)(citations omitted).

40. Section 363(n) of the Bankruptcy Code further provides, in relevant part, that:

The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount.

41. The Seller submits, and will present evidence at the Sale Hearing, that the Agreement reflects an intensely negotiated, arm's length transaction. Throughout the negotiations, the Purchaser has at all times acted in good faith. Moreover, to the extent that the

assets are sold to a Successful Bidder, it will be because of a well-planned competitive process and intense negotiations at arm's length to be conducted at an Auction. As a result of the foregoing, the Seller requests that the Court make a finding that the Purchase Price to be paid by the Purchaser or the Successful Bidder constitutes reasonably equivalent value and fair consideration under any applicable law.

42. The Seller further requests that this Court make a finding that the Purchaser or the Successful Bidder, as the case may be, has purchased the Property in good faith within the meaning of section 363(m) of the Bankruptcy Code. Further, the Seller requests that this Court make a finding that the purchase agreement reached as a result of the Bidding Procedures necessarily will comprise an arm's length, intensely-negotiated transaction entitled to the protections of section 363(m) of the Bankruptcy Code. Because the Seller has shown that the Purchaser's or Successful Bidder's bid is not the product of fraud or collusion between the Purchaser or Successful Bidder and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders, the

Seller further requests that this Court make a finding that the transactions contemplated by the Agreement are not avoidable under section 363(n) of the Bankruptcy Code.

V. THE SALE OF THE PROPERTY FREE AND CLEAR OF CLAIMS, LIENS, AND ENCUMBRANCES SHOULD BE AUTHORIZED UNDER BANKRUPTCY CODE SECTION 363(f).

43. To facilitate a Sale of the Property, the Seller requests authorization to sell the Property free and clear of any and all Liens except the Permitted Encumbrances.

44. Under section 363(f) of the Bankruptcy Code, a debtor in possession may sell property free and clear of any interest in such property if, among other things:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

45. Section 363(f) permits the sale of estate property free and clear of interests if any one of the five conditions above is met. See, e.g., In re Laines, 352 B.R. 410, 414-15 (Bankr. E.D. Va. 2005).

46. Courts have held that the authority of a debtor to sell assets free and clear of interests is broad and should be read expansively. See In re TWA, Inc., 322 F.3d 283, 289 (3d Cir. 2003); see also United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.), 99 F.3d 573, 582 (4th Cir. W. Va. 1996) (holding that the phrase "any interest in property" includes more than just in rem interests); In re P.K.R. Convalescent Centers, Inc., 189 B.R. 90, 94 (Bankr. E.D. Va. 1995) ("As the plain meaning of the statute demonstrates, § 363 covers more situations than just sales involving liens."). Moreover, courts have noted that the purpose of the "free and clear" language is to allow the debtor to obtain a maximum recovery on its assets in the marketplace. See In re TWA, Inc.,

2001 Bankr. LEXIS 723, at *8-*10 (Bankr. D. Del. Mar. 27, 2001).

47. Accordingly, this Court should authorize the Seller to sell the Property free and clear of Liens, except the Permitted Encumbrances, with any such Liens attaching to the net proceeds of the Sale of the Property in the same order and priority as they exist against the Property and in accordance with the terms and provisions of the Debtors' post-petition financing facility.

VI. WAIVER OF THE TEN-DAY STAY PROVIDED BY BANKRUPTCY RULE 6004 SHOULD BE WAIVED FOR ANY ORDER APPROVING THE SALE OF THE PROPERTY.

48. Bankruptcy Rule 6004(h) provides that: "[a]n order authorizing the use, sale, or lease of property is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h).

49. The Seller requests that the Court waive the ten-day stay of Bankruptcy Rule 6004 with respect to the Sale of the Property following the entry of the Sale Order. By waiving such requirements, the Seller and the Purchaser or the Successful Bidder, as applicable, will be able to immediately close the Sale, which will result

in immediate proceeds to the Seller's estate as well as immediate cessation of accrual of further administrative expenses related to the Property.

NOTICE

50. Notice of this Motion has been provided to those parties entitled to notice under the Order Pursuant to Bankruptcy Code Sections 102 and 105, Bankruptcy Rules 2002 and 9007, and Local Bankruptcy Rules 2002-1 and 9013-1 Establishing Certain Notice, Case Management, and Administrative Procedures (D.I. 130; the "Case Management Order"), as well as (a) all entities known to have expressed an interest in a transaction regarding the Property during the past three (3) months; (b) all entities known to have an interest in any of the Property, including Gateway Company, L.C.; and (c) all federal, state, and local regulatory or taxing authorities or recording offices that have a reasonably known interest in the relief requested through the Motion. Notice of the entry of the Order will be provided to the same parties. The Debtors submit that, under the circumstances, no other or further notice need be given.

WAIVER OF MEMORANDUM OF LAW

51. Pursuant to Local Bankruptcy Rule 9013-1(G), and because there are no novel issues of law presented in the Motion and all applicable authority is set forth in the Motion, the Seller requests that the requirement that all motions be accompanied by a separate memorandum of law be waived.

NO PRIOR REQUEST

52. No previous request for the relief sought herein has been made to this Court or any other court.

CONCLUSION

WHEREFORE, the Seller respectfully requests that the Court enter an Order, substantially in the form annexed hereto, granting the relief requested herein and such other and further relief as may be just and proper.

Dated: July 2, 2009

Richmond, Virginia SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
 Gregg M. Galardi, Esq.
 Ian S. Fredericks, Esq.
 P.O. Box 636
 Wilmington, Delaware 19899-0636
 (302) 651-3000

- and -

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
Chris L. Dickerson, Esq.
155 North Wacker Drive
Chicago, Illinois 60606
(312) 407-0700

- and -

MCGUIREWOODS LLP

/s/ Douglas M. Foley
Dion W. Hayes (VSB No. 34304)
Douglas M. Foley (VSB No. 34364)
One James Center
901 E. Cary Street
Richmond, Virginia 23219
(804) 775-1000

Counsel for Debtors and Debtors
in Possession